No. 18-422

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL., APPELLANTS

v.

COMMON CAUSE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, INDIANA, LOUISIANA, OHIO, OKLAHOMA, SOUTH CAROLINA, AND UTAH AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arkansas, Georgia, Indiana, Louisiana, Ohio, Oklahoma, South Carolina, and Utah. The States have a vital interest in the rules that govern apportionment of seats for state legislative bodies and the United States House of Representatives. This Court has repeatedly held that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). Such reapportionment, the Court has recognized, is an inherently political task. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). The Court has never held that a State violates the Constitution by pursuing or achieving political goals through reapportionment.

Yet in this case, the district court struck down the North Carolina map as an impermissible gerrymander under *four* different theories. The district court's decision does not articulate a manageable standard for distinguishing permissible from impermissible partisan motivation. Although it considers partisan motivation, the district court's analysis rests on a statistical analysis that is designed to ignore partisan concerns. The end result is an "I-know-it-when-I-see-it" approach that invites judges to choose the winners and losers in both redistricting and in the state legislatures based on the judges' own political leanings. It invites openly partisan policy battles in the courtroom. Such battles will expose every State to litigation under a legal standard so indeterminate that any party that loses in the legislature has a plausible chance of overriding that policy decision in the courts. The Constitution does not support, let alone compel, this result.

SUMMARY OF ARGUMENT

For the reasons set out in appellants' briefing, the district court lacks jurisdiction. The plaintiffs lack standing under the principles set out in *Gill*, and in any event, their claims are not justiciable. The Court thus need not reach the merits.

If the Court were to reach the merits, it should conclude that the Equal Protection Clause does not prohibit partisan purposes when reapportioning legislative seats. The Court has repeatedly recognized that legislative reapportionment is an inherently partisan task. That is because partisan purpose is inherent in the nature of legislative reapportionment, and there is nothing invidious or irrational about such purposes. Indeed, to equate partisan preference with invidious purpose—as the district court did below—contravenes this Court's presumption of constitutionality and good faith for government actions.

ARGUMENT

This Court has repeatedly recognized a widely known fact: Politics is, and always has been, a part of redistricting. Far from being invidious or irrational, political competition is a necessary component of legislative-controlled redistricting. The district court fundamentally misunderstood this Court's Equal Protection Clause precedent, which requires a showing of invidious or irrational purpose—and one that overcomes the strong presumption of constitutionality and good faith accorded to legislative acts.

I. Legislatures Do Not Act Invidiously or Irrationally, Under the Equal Protection Clause, When They Reapportion With a Partisan Purpose.

Legislatures do not act invidiously or irrationally when they reapportion with a partisan purpose. And the Court has recognized numerous times that partisan politics are inherent in the nature of legislative-controlled reapportionment. This fatally undermines the existence of partisan-gerrymandering claims.[1]

A. Partisan-gerrymandering claims require showing that a legislature acted with an invidious or irrational purpose.

A claim of unconstitutional partisan gerrymandering is an allegation, under the Equal Protection Clause, that a legislature has acted with an invidious or irrational *purpose*. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment) (a partisan-gerrymandering claim alleges that "political classifications . . . were applied in an invidious manner or in a way unrelated to any legitimate legislative objective"); *see also Whitcomb v. Chavis*, 403 U.S.

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[1] The Court can therefore hold that partisan-gerrymandering claims are not cognizable under the Equal Protection Clause—wholly apart from any potential application of the political-question doctrine's limits on Article III jurisdiction. That said, the political-question doctrine would independently bar partisan-gerrymandering claims. Partisan concerns are a constitutionally appropriate element in the redistricting process, so any partisan-gerrymandering standard triggered by the degree of partisan interest motivating the plan can have no predictable limiting principle and is, at base, a question for the political branches. *E.g., Baker v. Carr*, 369 U.S. 186, 217 (1962) (holding that, among other things, the "lack of judicially discoverable and manageable standards" for resolving a dispute make it a political question, outside the Judiciary's power).

124, 155 (1971) ("it would not follow that the Fourteenth Amendment had been violated unless [the law] is invidiously discriminatory"); *Gaffney*, 412 U.S. at 754 (redistricting plan may be unconstitutional if political group is "fenced out of the political process and their voting strength invidiously minimized").

Because a partisan-gerrymandering challenge to a redistricting plan must allege invidious action, it is "subject to the standard of proof generally applicable to Equal Protection Clause cases." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982). The Equal Protection Clause does not forbid state action that merely affects some individuals differently than others. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("[T]he Fourteenth Amendment guarantees equal laws, not equal results."). A claim of mere disparate effect does not violate the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229, 240 (1976); *see Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481 (1997) (citing *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality op.)).

Plaintiffs' obligation to prove invidious purpose, therefore, "is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." *Rogers*, 458 U.S. at 619 (quoting *Bolden*, 446 U.S. at 66 (plurality op.)).

B. Partisan purposes are inherent in legislature-controlled redistricting, and there is nothing invidious or irrational about such purposes.

This Court has said time after time that partisan purposes are inherent in redistricting, for example:

- "Politics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 753.
- "In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33.
- "[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition." *Miller v. Johnson*, 515 U.S. 900, 914 (1995).
- Redistricting "ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment." *Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam).[2]

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[2] *See also Vieth*, 541 U.S. at 285 (plurality op.) ("The Constitution clearly contemplates districting by political entities . . . and unsurprisingly that turns out to be root-and-branch a matter of politics."); *Shaw v. Reno*, 509 U.S. 630, 662 (1993) (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics . . ."); *Davis v. Bandemer*, 478 U.S. 109, 129 (1986) (plurality op.) ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."); *Karcher*

Consequently, the fact that a legislature reapportioned with a partisan purpose is not evidence that the legislature acted invidiously or irrationally. *See, e.g.*, *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring in the judgment) ("[A]ppellants' evidence at best demonstrates only that the legislature adopted political classifications. That describes no constitutional flaw . . . .").

In contrast, when a legislature acts with a purpose to create a racial classification, for example, that purpose is inherently suspect.[3] But there is nothing inherently suspect, invidious, or irrational about a legislature using a partisan purpose when redistricting. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) ("Race is an impermissible classification. Politics is quite a different matter." (citation omitted)).

This Court's precedent establishes that partisanship and entrenchment are not invidious purposes—and for good reason. For example, bipartisan gerrymanders, which often favor incumbent legislators of both parties, are permissible. *See Gaffney*, 412 U.S. at 751 (holding that a redistricting plan drawn by a bipartisan commission along political lines was not invidiously discrimina-

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v. Daggett, 462 U.S. 725, 753 (1983) (Stevens, J., concurring) ("Legislators are, after all politicians; it is unrealistic to attempt to proscribe all political considerations in the essentially political process of redistricting.").

[3] *See Rogers*, 458 U.S. at 617 ("[I]n order for the Equal Protection Clause to be violated, 'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.'" (quoting *Washington v. Davis*, 426 U.S. at 240)); *Bolden*, 446 U.S. at 66 (plurality op.) ("We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.").

tory); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) ("The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."). Such gerrymanders are just as likely to involve both an "injection of politics," *Vieth*, 541 U.S. at 293 (plurality op.), and an intent to entrench those who control the process. But neither violates equal protection: "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Gaffney*, 412 U.S. at 753.

Determining what is "politically fair" is a task left to the States to resolve through the political process. *See, e.g.*, *Miller*, 515 U.S. at 915 ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.").

C. The presumptions of constitutionality and good faith for government actions, combined with the many traditional purposes inherent in any reapportionment, make it incredibly difficult—if not impossible—to show invidious partisan purpose.

Even if the Court were to entertain the possibility that a drastic, specific type of partisan purpose could possibly rise to the level of invidious or irrational intent, it would be very difficult—if not impossible—to sustain such a claim. This Court's established precedent makes clear that any unlawful-purpose analysis requires "extraordinary caution" and faces an exacting standard: it requires the clearest proof of invidious purpose in light of the heavy presumptions of constitutionality and good

faith accorded to government actions. *See, e.g.*, *Miller*, 515 U.S. at 916 (recognizing a "presumption of good faith that must be accorded legislative enactments, requir[ing] courts to exercise extraordinary caution in adjudicating claims that a State has [engaged in invidiously-motivated action]"). Plus, any redistricting plan will necessarily involve traditional, legitimate reapportionment purposes—including compliance with the one-person, one-vote doctrine, which already significantly cabins the ability of legislatures to engage in excessive partisan gerrymanders.

1. The exacting standard for invidious-purpose challenges to government action is just one application of the Court's general recognition that government action is presumed valid, *e.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918); that government actors are presumed to act in "good faith," *Miller*, 515 U.S. at 916; and that a "presumption of regularity" attaches to official government action, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). These doctrines create a "heavy presumption of constitutionality." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990).

This Court, therefore, "has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-31 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). So the Court has permitted an unlawful-purpose analysis of government action in only a "very limited and well-defined class of cases." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991).

Even when it has permitted an unlawful-purpose analysis of government action, the Court has

concomitantly stated that any such analysis proceeds under an exacting standard. As Chief Justice Marshall explained over two centuries ago in *Fletcher*, government action can be declared unconstitutional only upon a "clear and strong" showing, 6 Cranch at 128.

The Court has thus explained, in various contexts, that only clear proof of unlawful purpose can allow courts to override facially neutral government actions. For example:

- When there are "legitimate reasons" for government action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim).
- A law's impact does not permit "the inference that the statute is but a pretext" when the classification drawn by a law "has always been neutral" as to a protected status, and the law is "not a law that can plausibly be explained only as a [suspect class]-based classification." *Feeney*, 442 U.S. at 272, 275 (rejecting equal-protection claim); *see Arlington Heights*, 429 U.S. at 269-71; *Washington v. Davis*, 426 U.S. at 245-48.
- Only the "clearest proof" will suffice to override the stated intent of government action, to which courts "defer." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (rejecting ex-post-facto claim); *see Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (citing *Fletcher*, 6 Cranch at 128).

This exacting standard for an unlawful-purpose challenge to facially neutral government action exists for good reason. It keeps a purpose inquiry judicial in nature, safeguarding against a devolution into policy-based reasoning that elevates views about a perceived

lack of policy merit into findings of illicit purpose. Even when an official adopts a different policy after criticism of an earlier proposal, critics can be quick to perceive an illicit purpose when they disagree with the final policy issued. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed."). The clearest-proof standard helps keep the Judiciary above that political fray.

2. The fact that reapportionment will always necessarily involve traditional redistricting motives in addition to partisan motives also significantly undermines any allegation of invidious partisan gerrymandering.

Legislatures in charge of redistricting operate under a "broad mandate," and their decisions are rarely "motivated solely by a single concern." *Arlington Heights*, 429 U.S. at 265. Thus, while partisan advantage is ever present, it is never a legislature's sole concern in redistricting. Many other traditional, legitimate factors figure into decisions to draw district boundaries in a certain way, such as "compactness, contiguity, and respect for political subdivisions." *Shaw v. Reno*, 509 U.S. at 647.

Importantly, the one-person, one-vote doctrine also significantly cabins the ability of legislatures to rely excessively on partisan purpose. By requiring districts of nearly equal population, legislatures are already limited in how they can use partisan purpose in reapportionment. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) ("Over the ensuing decades, the Court has several times elaborated on the scope of the one-person, one-vote rule.").

When weighing all these traditional reapportionment criteria, politicians' attention naturally gravitates towards the "the location and shape of districts [that]

may well determine the political complexion of the area," *Gaffney*, 412 U.S. at 753, and affect their chances of reelection or the probability that their favored legislation will pass. Voters expect no less. *See* Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?* 33 UCLA L. Rev. 1, 74 (1985) ("[W]hat . . . matters to almost all Americans when district lines are drawn, is how the fortunes of the parties and the policies the parties stand for are affected. When such things are at stake there is no neutrality. There is only political contest.").

3. The district court did not apply the presumption of constitutionality and good faith, and it contravened this Court's precedent by equating partisan purpose with invidious intent. Rather than exercise "extraordinary caution," *Miller*, 515 U.S. at 916, the district court declared an "invidious" purpose in redistricting based on mere run-of-the-mill evidence of partisan preferences. But evidence of partisan purpose is not evidence of invidious intent. *See supra* Part I.B.

Under the district court's approach, any effort to secure a marginal partisan advantage might qualify as prohibited invidious discrimination. This Court's precedents do not permit that result—especially when virtually every redistricting case will likely abound with indicators of political motive. *See, e.g.*, *Vieth*, 541 U.S. at 347-50 (Souter, J., dissenting) ("[U]nder a plan devised by a single major party, proving intent should not be hard, . . . politicians not being politically disinterested or characteristically naïve.").

II. Plaintiffs Lack Standing, and Their Claims Are Not Justiciable.

Plaintiffs' claims for partisan gerrymandering fail at the outset because they lack standing. Like the *Gill* plaintiffs, they press no concrete injury, but instead seek to vindicate a generalized preference to see more members of a particular party win elections. They profess that their claims are about achieving "good government," not vindicating a particularized harm. Memorandum Regarding Remedies From Common Cause and League of Women Voters Plaintiffs at 3, *Common Cause v. Rucho*, 318 F. Supp.3d 777 (M.D. N.C. 2018) (No. 1:16-CV-1026), ECF No. 144. For these reasons and those explained at length in the appellants' briefing, the district court lacked subject matter jurisdiction. *See* Jurisdictional Statement 16-23. Amici urge the Court to decide this case on the jurisdictional grounds appellants press. *See id.*

In addition, plaintiffs' claims are nonjusticiable because they ask the Court to resolve political questions. As explained in appellants' briefing, there is no workable test for adjudicating partisan gerrymandering claims. *See id.* 26, 28-37; *see also supra* Part I.

CONCLUSION

The district court lacked jurisdiction. This Court should vacate the judgment of the district court and order the district court to dismiss the lawsuit. Alternatively, this Court should reverse the judgment of the district court.

Respectfully submitted.

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